



that regard.

At the time of the dismissal of the petitioner's first § 2254 petition, Judge Bataillon stated that:

... the petitioner's first claim is denied and dismissed on the merits, and his second claim is dismissed as unexhausted. As a result, the petitioner's § 2254 petition will be dismissed. The petitioner is hereby forewarned that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposed a one-year statute of limitations for filing habeas corpus petitions in federal court. See 28 U.S.C. § 2244(d). That limitations provision will apply to any subsequent petition the petitioner may file in this court. In addition, 28 U.S.C. § 2244(b), as amended by the AEDPA, precludes the filing of a subsequent habeas corpus petition in a federal district court absent certification by a panel of the appropriate court of appeals for the circuit in which the district court is located, authorizing the district court to consider the successive petition.

Therefore, on initial review of the § 2254 petition in the above-entitled action, I provisionally find that this case may be subject to summary dismissal under Rule 4 of the § 2254 Rules. The respondent shall address whether this case is a "second or successive habeas corpus application under section 2254," within the meaning of 28 U.S.C. § 2244(b). 28 U.S.C. § 2244(b), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), precludes the filing of a subsequent habeas corpus petition absent certification by a panel of the appropriate court of appeals for the circuit in which the district court is located, authorizing the district court to consider the successive petition.<sup>1</sup>

IT IS THEREFORE ORDERED:

1. That the Clerk of Court shall mail copies of the § 2254 petition to the respondent and to the Nebraska Attorney General by regular first-class mail;
2. That, within forty (40) days of the date of this Order, the respondent shall file a brief regarding whether this case is a "second or successive habeas corpus application under section 2254," within the meaning of 28 U.S.C. § 2244(b);
3. That within twenty (20) days after his receipt of the respondent's brief, the petitioner shall notify the court in writing whether or not he has obtained the assistance of a prison legal aide to assist him in preparing a responsive brief on the single issue on which the court has requested briefs (successive habeas);

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<sup>1</sup>The timeliness issue is of less consequence because a good argument can be made in favor of equitable tolling given the reversal of the Eighth Circuit's prohibition against stays pending exhaustion, during a critical period in the petitioner's proceedings.

4. If the petitioner has been able to obtain legal assistance within the prison system, he shall also inform the court approximately how long he estimates he and the legal aide will need to prepare the petitioner's responsive brief; and

5. That filing no. 4, the petitioner's Motion for Appointment of Counsel, is denied at this time, but the motion may be reconsidered sua sponte if the petitioner notifies the court that, notwithstanding diligent efforts, he has been unable to obtain any legal assistance within the prison system; however, any such assertion must be supported by a detailed account of the efforts made by the petitioner to obtain legal assistance from prison authorities.

DATED this 26<sup>th</sup> day of January, 2007.

BY THE COURT:

s/ F. A. GOSSETT  
United States Magistrate Judge